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Embassy Group, Inc. v. T. Daryl and Maureen Hatch : Brief of Appellee

Utah Court of Appeals

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DOCKET NO. 920427 IN THE UTAH COURT OF APPEALS

EMBASSY GROUP, INC.	)	
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	Case No. 920427-CA
	)	
T. DARYL and MAUREEN HATCH	)	Priority 16
	)	
Defendants/Appellees.	)	

BRIEF OF APPELLEES - T. DARYL and MAUREEN E. HATCH

APPEAL FROM A JUDGMENT IN THE SECOND JUDICIAL DISTRICT COURT FOR DAVIS COUNTY, STATE OF UTAH THE HONORABLE DOUGLAS CORNABY, PRESIDING

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STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction over this matter pursuant to Section 78-2(a)-3, Utah Code Ann. 1953 as amended.

STATEMENT OF ISSUES

1. Should the trial court's decision be affirmed on the basis that Appellant has failed to marshal the evidence in support of the trial court's findings?

2. Did the trial court correctly recognize that through the parties' actions, words, and documentation of their transaction, they had reached a "meeting of the minds" sufficient to establish an enforceable contract?

3. Did the trial court properly refuse to grant Embassy relief on their equitable theory of unjust enrichment on the basis that their argument did not meet the requirements of the Utah Statute of Frauds?

DETERMINATIVE STATUTES

RULE 52(a) UTAH RULES OF CIVIL PROCEDURE

. . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . .

§ 25-5-1 UTAH CODE ANNOTATED (1953 as amended)

Estate or interest in real property.

No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

STATEMENT OF CASE

Procedural Background

Appellant/Plaintiff, Embassy Group, Inc., originally filed this action against Appellees/Defendants, T. Daryl and Maureen E. Hatch, on or about August 14, 1990. Embassy Group, Inc. is the successor to Granada, Inc. as a general partner of a Utah Limited Partnership by the name of Shim Investments (R. 172). Granada, Inc. was a co-general partner of Shim until December 4, 1986. (*See* Complaint page 3). Embassy Group, Inc. asserted at trial that it had been assigned all of Shim's rights in the contract with the Hatches (R. 172).

Appellant's original complaint sought enforcement of an alleged oral agreement for the purchase of real property, or in the alternative, reformation of the parties' written agreement on the basis of mutual mistake, fraud, and unjust enrichment. Further, Appellant asserted a right to acquire quiet title to all of Lot 33 of the Bridlewood Subdivision Phase II. (Complaint at p.7).

Appellees argued that the Appellant's claims were barred by the Statute of Frauds provisions contained in U.C.A. Section 25-5-1, that the final documents which were the subject of the litigation accurately reflected the agreement ultimately reached by the parties, that the Appellees fully performed their obligations under the agreement, and that Appellant's claims were wholly without merit.

The case was tried on December 12 and 13, 1991, without a jury before the Honorable Douglas L. Cornaby. At the conclusion of the trial, Judge Cornaby rendered oral findings and conclusions from the bench and granted judgment in favor of the Hatches, concluding Embassy was not entitled to recover under any of the claims plead (R. 301-309).

On or about December 31, 1991, the Hatches submitted their Findings of Fact and Conclusions of Law and Judgment to the Court. On January 23, 1992, Embassy filed its objection to the entry of said Findings of Fact and Conclusions of Law and Judgment. On January 29, 1992, Judge Cornaby executed the Findings of Fact and Conclusions of Law and entered Judgment in favor of the Hatches.

During the early part of June 1992, Embassy filed a Notice to Submit for Decision related to their January 23, 1992 Objection to the Findings of Fact and Conclusions of Law. Judge Cornaby thereafter, on June 5, 1992, issued a written denial as to all of the objections raised by Embassy.

Statement of Material Facts

1. During the latter part of the summer in 1986, Embassy's predecessor, Granada, Inc./Shim Investments and the Hatches entered into negotiations for the purchase of a building lot in the Bridlewood Subdivision in Bountiful, Utah, Davis County. (R. 63-67, 228, 242-246).

2. The parties discussed numerous options concerning the purchase of a building lot for the Defendants' proposed home. Ultimately, the parties' negotiations focused on Lot 33 of the Bridlewood Subdivision (R. 228, 242-246).

3. The majority of the adjacent and surrounding lots in the area were being marketed for $30,000.00 to $40,000.00 per lot (R. 96, 120).

4. Lot 33 was larger in size than the majority of the surrounding lots, however, because Lot 33 sloped dramatically downward toward the rear of the lot, its buildable area was substantially reduced (R. 121).

5. From the outset, the Hatches advised Granada, Inc./Shim Investment's agent, Mark Wahlquist, that they could only afford a lot in the $40,000.00 range (R. 66).

6. During the negotiation for the purchase price of the building lot, the parties discussed various prices for various lots and portions of lots, including Lot 33 of the Bridlewood Subdivision (R. 228, 242-246).

7. Ultimately, the parties reached an agreement whereby the Hatches would purchase Lot 33 of the Bridlewood Subdivision for $40,000.00. The terms of the purchase were to be $20,000.00 down payment at the time of closing, and $20,000.00 on a Trust Deed Note due and payable at such time as the Hatches obtained long-term financing on their new home or

November 25, 1987, whichever occurred first (R. 228-231).

8. Embassy's agent, Mark Wahlquist, made all arrangements for the closing and preparation of the necessary documents with Associated Title Company (R. 79-80).

9. Pursuant to Mr. Wahlquist's direction, Associated Title prepared the appropriate deeds and instructions consistent with the parties' agreement. Mr. Wahlquist also ordered a title report and title insurance policy on all of Lot 33 for the benefit of the Hatches as the purchaser (R. 79-85).

10. Closing on the transaction took place on November 25, 1986.

11. Associated Title Company prepared a Trust Deed and Trust Deed Note for the $20,000.00 contract amount, and Buyer's and Seller's Statements reflecting the total sales price of $40,000.00, $20,000.00 due at closing, and $20,000.00 carried on the Trust Deed Note (Trial Exhibits P-9 and D-5).

12. Plaintiff's agent, Mark Wahlquist, executed the Seller's Statement and the Trust Deed Note, indicating his approval of the documents as they were prepared by Associated Title (R. 75-76).

13. Simultaneously, Keith B. Sorenson, Vice President of Embassy's predecessor, Granada, Inc., executed and delivered a Special Warranty Deed conveying all of Lot 33 to Defendants. The Special Warranty Deed was recorded in the office of the Davis County Recorder's Office the following day, November 26, 1986 (R. 76-77).

14. On or about July 22, 1987, Defendants' lender, First Security Bank, paid the $20,000.00 Trust Deed Note directly to Granada, Inc./Shim Investments from the long-term loan proceeds on the home (Trial Exhibit D-3).

15. On or about that same day, Associated Title, as trustee, transferred a Deed of Trust to the Hatches for Lot 33 as directed by Granada, Inc./Shim Investments (Trial Exhibit P-8).

16. During the last week of December, 1989, C. Dean Larsen contacted Defendant Hatch and erroneously indicated that the Trust Deed Note was past due (R. 204).

17. On March 13, 1990, Larsen wrote Hatch a letter again demanding that the balance of the Trust Deed Note be paid off, this time asserting that $40,000.00 remained due and owing. Defendant informed Larsen that the Note had previously been paid and he did not owe an additional $40,000.00 (R. 204-205).

18. On or about March 19, 1990, C. Dean Larsen, President of Embassy Management Group, Inc., wrongfully filed a Notice of Interest against Lot 33 of the Bridlewood Subdivision.

19. Thereafter, Embassy filed this action in the Second Judicial District Court for the State of Utah on August 16, 1990.

SUMMARY OF ARGUMENT

I.

Embassy has failed to meet the standards set forth in Rule 52(a), and interpreted by the recent decisions of this Court and the Utah Supreme Court, to show the trial court committed substantial error in making the findings and judgment which it did. The legal presumption that the trial court's findings and judgment are valid and correct has not been overcome by a

compelling showing that the trial court committed reversible error.

More specifically, Embassy has not marshaled all of the evidence in support of the trial court's findings. Rather, they have attempted to cite the court to the conflicting evidence in light most favorable to their position and have ignored the plethora of contrary evidence relied upon by the trial court in making its ruling. Most critical is the absence of any reference to the documentary exhibits received into evidence which support the trial court's decision.

Because Embassy has not made the necessary showing, nor overcome the requisite burden of Rule 52(a), particularly when one considers that the record on review must be construed in the light most favorable to the Hatches in this case, their appeal must be denied. There is no justiciable reason to disturb the trial court's findings.

II.

The trial court properly concluded that the written documentation prepared and executed by Embassy was tantamount to the fact that the parties did reach a "meeting of the minds."

The law generally states that there can be no contract without a meeting of the minds of the parties, which must be spelled out either expressly or impliedly with sufficient definiteness to allow enforcement. However, the court will look to the memorialization of the parties' agreement to identify what their intentions were. The documents related to this transaction are not ambiguous nor are they unclear. Without any argument, all of the written documentation executed by the parties at closing provides that Lot 33 was to be transferred to the Hatches for

a total of $40,000. That transaction was to be in two parts, $20,000 to be paid at closing, and $20,000 at such time as the Hatches obtained their long term financing or November 25, 1987, whichever occurred first. It is undisputed that those amounts were timely paid.

For Embassy to argue that they understood the agreement to be something different than as provided for in all of the closing documents, which were directed to be prepared by them and thereafter executed by them, is simply not credible. The law will not test the parties' "meeting of the minds" on some post-event, subjective theory, that works only to the advantage of the seller herein. Rather, the trial court correctly identified the parties' intended "meeting of the minds" based upon the evidence before it.

III.

The trial court correctly recognized the applicable provisions of Utah Code Annotated, Section 25-5-1, which sets forth the Statute of Frauds and how it relates to this transaction for the purchase of real estate. The Statute requires that any estate or interest in real property, other than leases for a term not exceeding one year, and any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, or surrendered unless it is in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

All of the closing documents, Buyer's Statement, Seller's Statement, the recorded Deed on the property and the Trust Deed Note, all reflect that the purchase price was $40,000.00. Embassy's own witnesses even admitted at the time of trial that there was no documentation evidencing the sale of Lot 33 for more than $40,000.00. Having failed to produce such a

writing, Embassy's claims were properly barred by the trial court pursuant to the provisions of the Utah Statute of Frauds.

The provisions of the Statute of Frauds applicable to contracts affecting interests in land were adopted for the express purpose of preventing existing estates in land from being upset by parol evidence, and to preserve the title to real property from the changes, the uncertainty, and the fraud, attending the admission of parol testimony. It would have been reversible error for the trial court to rule any other way than the way it did.

IV.

Embassy's claims for restitution under a theory of unjust enrichment must also fail. In order to properly be awarded restitution under a theory of *quantum meruit*, Embassy must show that no written or oral contract existed. The parties did in fact have a contract to purchase Lot 33 for $40,000, and thus recovery under the theory of unjust enrichment was properly denied. This transaction was covered by an express contract whose terms were clear and unequivocal. There could be no finding in equity that they were entitled to restitution.

ARGUMENT

I.

EMBASSY HAS FAILED TO MARSHAL ALL OF THE EVIDENCE IN SUPPORT OF THE TRIAL COURT'S FINDINGS, THEREFORE REQUIRING THE TRIAL COURT'S JUDGMENT TO BE AFFIRMED

As appellant, Embassy bears a substantial burden of establishing that the trial court committed reversible error. Their challenge to the findings and judgment of the trial court requires that they sustain the burden of showing "clearly erroneous" reversible error. Rule 52(a) Utah Rules of Civil Procedure; Wade v. Jobe, 818 P.2d 1006, 1016 (Utah 1991); West Valley City v. Majestic Inv. Co., 818 P.2d 1311 (Utah App. 1991).

The appropriate standard of review applicable to a challenge of the trial court's findings and judgment is that the appellate court should regard the trial court's finding and judgment with a presumption of validity and correctness. Rule 52(a) Utah R.Civ.P.; Doelle v. Bradley, 784 P.2d 1176 (Utah 1989); Hatcheson v. Gleave, 632 P.2d 815 (1981); Kohler v. Garden City, 639 P.2d 162 (1981).

Embassy is required to sustain that burden of showing error, based upon a review by the appellate court with a presumption of validity to the findings and judgment of the trial court, and that the record be construed in the light most favorable to the prevailing party at the trial court level. The decision of the trial court should not be disturbed unless the appellate court finds substantial support for such reversal in the evidence. Doelle v. Bradley, supra, 784 P.2d at 1178; Hatcheson v. Gleave, supra; Kohler v. Garden City, supra.

To successfully attack findings of fact, an appellant must first marshal all the evidence supporting the findings and then demonstrate that, even if viewed in light most favorable to the trial court, the evidence is legally insufficient to support the findings. Wade v. Jobe, supra, 818 P.2d at 1016; West Valley City v. Majestic Inv. Co., 818 P.2d at 1313; Doelle v. Bradley, supra, 784 P.2d at 1178 (Utah App. 1989); Reid v. Mutual of Omaha Insurance Company, 776 P. 2d 896, 899 (Utah 1989); In re Estate of Bartell, 776 P. 2d 885, 886 (Utah 1989); Scharf v. BMG Corp., 700 P. 2d 1068, 1070 (Utah 1985).[1]

The legal sufficiency of the evidence is determined under Rule 52(a) Utah Rules of Civil Procedure, which provides: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Utah R. Civ. P. 52(A). A trial court's factual finding is deemed " clearly erroneous" only if it is against the clear weight of evidence. Wade v. Jobe, supra, 818 P.2d at 1016; West Valley City v. Majestic Inv. Co., 818 P.2d at 1313; Reid v. Mutual of Omaha Insurance Company, supra, 776 P. 2d at 899-900; In re Estate of Bartell, supra, 776 P. 2d at 886; See Western Kane County Special Service, Dist. No. 1 v. Jackson Cattle Co., 744 P. 2d 1376, 1377 (Utah 1987).

In the present case, Embassy has not marshaled all the evidence to demonstrate that the evidence supporting the trial court's findings is legally insufficient. Their brief presents the

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[1]The Utah Court of Appeals has previously stated, "The challenging party must marshal *all* relevant evidence presented at trial which tends to support the findings and demonstrate why the findings are clearly erroneous. Bell v. Elder, 782 P.2d 545, 547 (Utah App. 1989). We have shown no reluctance to affirm when the appellant fails to adequately marshal the evidence. See e.g., Grahn v. Gregory, 800 P.2d 320 (Utah App. 1990); Turnbaugh v. Anderson, 793 P.2d 939 (Utah App. 1990)."

conflicting evidence in light most favorable to their position and largely ignores the contrary evidence. The Utah Supreme Court held specifically in the case of Doelle v. Bradley, 784 P.2d 1176, 1178 (Utah 1989) that:

> In the present case, Robert has not attempted to marshal the evidence in support of the trial court's findings and demonstrate that the evidence supporting the findings is legally insufficient. His brief presents the conflicting evidence in a light most favorable to his position and largely ignores the contrary evidence. Therefore, there is no reason for us to disturb the trial court's findings.
>
> Id. at 1178; See also, West Valley City v. Majestic Inv. Co., 818 P.2d 1311 (Utah App. 1991).

For example, Embassy argues that the Trial Court's written finding of fact No. 7 is "clearly erroneous." (Appellant's Brief at 26). Therein the Trial Court found:

> 7. All of the written documentation concerning the sale of Lot 33 to the defendants indicates that the purchase price was $40,000.00. (Findings of Fact at 2).

The Trial Court received into evidence Plaintiff's Exhibits P-6 [Executed Earnest Money Agreement, (R. 36-40); P-7 [Seller's Closing Statement] (R. 42-43); P-8 [Deed of Trust] (R. 208); P-9 [Trust Deed Note] (R. 208); and P-10 [Special Warranty Deed] (R. 44-46). In addition, the Trial Court received Defendant's Exhibits Nos. D-1 [Purchaser's Closing Statement] (R. 209, 234); D-2 [Title Insurance Policy] (R. 209, 234); and D-3 [FSB Loan Proceeds Breakdown] (R. 209).

Each of these Exhibits either on their face or coupled with the witness testimony attendant to their admission indicates that the purchase price of Lot 33 was to be $40,000.00. Embassy's argument that the Trial Court's finding that the documents indicated the purchase price was to be $40,000.00 was in error are without any foundation. To the contrary, because

the Trial Court was not presented any documentary evidence to support Embassy's claim that the sale was to be for $80,000.00, the Trial Court was left with no alternative but to find as it did:

> All the written documents do show $40,000, and that does create a problem so far as Statute of Frauds. If the sale price was really $80,000 and if both plaintiff and defendant understood it was $80,000, then the Court can't escape from the fact that they were conspiring to deceive the lender bank. . . . And so if they had gone ahead with the transaction from the view of Mr. Wahlquist, it would have been with what we in the law call unclean hands. . . (R. 304).

The trial transcript is replete with testimony and evidence to support the Trial Court's finding that the sales price of Lot 33 was to be $40,000. (R. 228, 231, 235, 237-238, 243, 246, 36-40, 42-43, 44-46, 208, and 234; *See also*, Trial Exhibits P-6, P-7, P-8, P-9, P-10, D-1, D-2, and D-3). The trial court was very careful to consider each of the issues which Embassy has raised on appeal. The trial court heard and received extensive evidence which supports the findings it ultimately reached.

The standard of appellate review as enumerated in Rule 52(a), and recent decisions of this Court and the Utah Supreme Court, dictate that appellants bear a significant burden to show the trial court committed substantial error in making the findings and judgment which it did. The legal presumption that the trial court's findings and judgment are valid and correct must be overcome by a compelling showing that the trial court committed reversible error.

Embassy has not made such a showing nor have they overcome that burden, particularly when one considers that the record on review must be construed in the light most favorable to the Hatches in this case. There is therefore no reason to disturb the trial court's findings.

II.

THE TRIAL COURT PROPERLY CONCLUDED THAT THE WRITTEN DOCUMENTATION PREPARED AND EXECUTED BY EMBASSY WAS THE BEST EVIDENCE OF THE PARTIES' "MEETING OF THE MINDS"

Appellants have offered the argument that the Trial Court erred in recognizing an enforceable contract between the parties, and suggest that there was no "meeting of the minds" between the parties as to their agreement. (Appellant's Brief at 8-15). They have cited three Utah cases to support their argument. However, those cases are easily distinguished from the case now before the Court in that in each instance cited, there was no clearly expressed or written agreement to evidence the terms of their accord.[2]

The more correct principle of law is that there can be no contract without a meeting of the minds of the parties which must be spelled out either expressly or impliedly with sufficient definiteness to allow enforcement. Valcarce v. Bitters, 362 P.2d 427 (Utah 1961) *as cited in* Oberhansly v. Earle, 572 P.2d 1384, 1386 (Utah 1977). A condition precedent to the enforcement of any contract is that there be a meeting of the minds of the parties, which must be spelled out, either expressly or impliedly. Pingree v. Continental Group of Utah, Inc., 558

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[2]The Davis (sic) v. Olson, 746 P.2d 264 (Utah App. 1987) case cited by the Appellants dealt specifically with a dispute over an oral agreement for the construction of four duplexes. The Cessan (sic) Fin. Corp. v. Meyer, 575 P.2d 1048 (Utah 1978) case is cited by Appellants for the proposition that "[C]ontractual mutual assent requires assent by all parties to the same thing in the same sense so that their minds meet as to all terms." The Cessna, supra, case involved a blank space in a guaranty agreement, and even the Cessna, supra, Court held that this was merely a general proposition not on point in that case. *(See*, Cessna Fin. Corp. v. Meyer, 746 P.2d at 1050). Finally, the Oberhansly v. Earle, 572 P.2d 1384 (Utah 1977) case involved conflicting terms contained within the parties' written agreement. Appellees contend that each of these cases are distinguishable.

P.2d 1317 (Utah 1975).

Appellants have argued that there was no enforceable contract for the sale of Lot 33 because there was no meeting of the minds as to the terms for its sale. (Appellants' Brief Pg. 9). It is universally accepted that a "meeting of the minds" is not an unvarying prerequisite to an enforceable contract. In fact, "the cases demonstrate plainly enough that a person may be held bound in accordance with his expressions as understood by others, even though his own intention and meaning were different." Corbin on Contracts, §§106-107 (5th Ed.).

The Utah Court of Appeals addressed a similar case to the instant case when it held in Verhoef v. Aston, 740 P.2d 1342 (Utah App. 1987) that:

> Contracts should be construed so as to give effect to the parties' intentions, and such intent should be determined, if possible, by examining the written agreement executed by the parties. *Citing* Atlas Corp. v. Clovis Nat'l Bank, 737 P.2d 225, 229 (Utah 1987).

Verhoef v. Aston, supra, 740 P.2d at 1344.

In the Verhoef, supra, case, there was a dispute between the terms of an Earnest Money Agreement and those identified in a subsequent Uniform Real Estate Contract. The Court pointed out that a basic tenet of contract law is that prior negotiations and agreements merge into the final written agreement on the subject. 740 P.2d at 1344, *citing* Dix Steel Co. v. Miles Const. Co., 443 P.2d 532, 535-36 (Wash. 1968). The Utah Court of Appeals determined in the Verhoef, supra case, that the uniform real estate contract was unambiguous and binding, and accordingly refused to find that there had been no meeting of the minds. Id. 740 P.2d at 1344.

If there was no "meeting of the minds" as to the terms of the parties' agreement in this case, it would seem inconsistent that Appellants would have directed the preparation of the closing documents as they did, and wholly implausible that they would execute and record them.

The record and the exhibits received into evidence at trial clearly support the Court's finding that the documentary evidence of this transaction contemplated a $40,000.00 purchase price. (R. 228, 231, 235, 237-238, 243, 246, 36-40, 42-43, 44-46, 208, and 234; *See also*, Trial Exhibits P-6, P-7, P-8, P-9, P-10, D-1, D-2, and D-3).

III.

THE TRIAL COURT PROPERLY REFUSED TO CONSIDER PLAINTIFF'S CLAIMS IN EQUITY BECAUSE THEY WERE BARRED BY THE STATUTE OF FRAUDS U.C.A. SECTION 25-5-1.

The trial court recognized the applicable provisions of Utah Code Annotated, Section 25-5-1, which sets forth the Statute of Frauds as follows (*See* R. at 304):

> **Estate or interest in real property.**
>
> No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

Despite the fact that all of the closing documents (R. 228, 231, 235, 237-238, 243, 246, 36-40, 42-43, 44-46, 208, and 234; *See also*, Trial Exhibits P-6, P-7, P-8, P-9, P-10, D-1, D-2, and D-3), the recorded Deed on the property (P-8) and the Trust Deed Note (P-9), all reflect that the purchase price was $40,000.00, Embassy's own witnesses admitted at the time of trial that there was no documentation evidencing the sale of Lot 33 for more than $40,000.00. (R.

90, 54-62).[3]

Appellant's principals were sophisticated real estate developers (R. 213). Several of their officers were attorneys with a strong real estate background (R. 213). Transactions of this type and magnitude were not uncommon for them. Yet, even if the parties reached the agreement Embassy asserted they did, they made no effort whatsoever to comply with the legal requirements to validate it.

The provisions of the Statute of Frauds applicable to contracts affecting interests in land were adopted for the express purpose of preventing existing estates in land from being upset by parol evidence, and to preserve the title to real property from the changes, the uncertainty, and the fraud, attending the admission of parol testimony. 72 Am.Jur. 604-605, Statute of Frauds, Section 44; *See also*, Martin v. Scholl, 678 P.2d 274, 280 (Utah 1983); Ravarino v. Price, 260 P.2d 570 (Utah 1953). Hence, the general effect of such provisions is to require all contracts concerning real estate to be in writing. Id., See also, U.C.A. 25-5-1 (1953 as amended). In addition, an oral agreement to enter into or reduce to writing and execute an agreement affecting an interest in lands is itself within the Statute of Frauds, and neither promise is enforceable unless the statute is satisfied. Id.

Appellants can point to absolutely no writing to support their claims at trial or on appeal so as to comply with the standard required by the Utah Statute of Frauds.[4] It is well settled that

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[3]Embassy's witness Mark Wahlquist also testified that only Plaintiff's Exhibit 6 [Earnest Money Agreement] was prepared and delivered to the Hatches for the sale of the property. (R. 55). That document clearly states the sales price was to be $40,000.

[4]When asked at trial if there was any agreement between Granada/Shim [Embassy] and the Hatches for $80,000, Mark Wahlquist testified, "Well, I knew there was no written agreement. . ." (R. 90).

a mortgage, in its legal aspect, is a conveyance of an estate or interest in the land, and, as such, within the meaning of those terms as used in the Statute of Frauds. A mortgage cannot be established by parol evidence even when it accompanies possession. Likewise, an oral agreement to give a mortgage in the future is in the nature of a contract for the sale of an interest in land, and as such is, within the provision of the statute relating to such contracts. Penn Mut. L. Ins. Co. v. Kimble, 272 NW 231 (Neb. 1937); Sleeth v. Sampson, 142 NE 355 (N.Y. 1923); *See also*, 30 ALR 1400.[5]

The overwhelming weight of authority in Utah also states that if an original agreement is within the Statute of Frauds, a subsequent agreement which modifies the original written agreement must also satisfy the requirements of the Statute of Frauds to be enforceable. Golden Key Realty, Inc. v. Mantas, 699 P.2d 730 (Utah 1985); Zion's Properties, Inc. v. Holt, Utah, 538 P.2d 1319, 1322 (1975); Coombs v. Ouzounian, 465 P.2d 356, 358 & n.4 (Utah 1970); Bamberger Co. v. Certified Productions, 48 P.2d 489, 491 (Utah 1935); Combined Metals, Inc. v. Bastian, 267 P. 1020, 1032 (Utah 1928); See also, 2 Corbin on Contracts 89-90, Section 301 (1950); 49 Am.Jur. 609-610, Statute of Frauds, Section 301. More importantly in this case, any such additional agreement or modification of the original agreement must be sufficiently certain and unequivocal in its terms that the parties understand what it is and what is to be done under it. Martin v. Scholl, supra, 678 P.2d 276-278; Zion's Properties, Inc. v. Holt, 538 P.2d 1319, 1322 (Utah 1975); Baugh v. Logan City, 495 P.2d 814 (Utah 1972); Birdzell v. Utah Oil Refining Co., 242 P.2d 578 (Utah 1952). Courts typically refuse to admit proof of an oral

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[5]It has also been held that a verbal agreement to create a lien on real estate in possession of the promisor falls within the Statute of Frauds. Avey v. Via, 7 SW2d 1057 (Kentucky 1928).

material modification of a written contract, because to do so would expose the oral modification to the evils which the Statute of Frauds was intended to prevent. 49 Am.Jur., supra, at 610.

The Earnest Money Agreement, the Trust Deed Note, all of the closing documents including the Buyer's and the Purchaser's Statement, all reflect that the total purchase price of Lot 33 was to be $40,000.00. There is absolutely no written documentation or corroboration that complies with the statute to support a finding that the purchase price was $80,000.00. Further, Embassy was unable to produce any writing or memoranda to comply with the Statute of Frauds concerning this transaction which reflects anything more than a $40,000.00 purchase price. Legal mandate requires that in order to succeed in their argument for an additional $40,000.00, such agreement must have complied with the requirements set forth in U.C.A. Section 25-5-1.

Finally, before an oral contract for the sale of an interest in land can ever be enforced, the oral contract and its terms must be clear, definite, mutually understood and established by clear, unequivocal and definite testimony or other evidence sufficient to take the case out of the Statute of Frauds. Bradshaw v. McBride, supra, 649 P.2d at 79; Martin v. Scholl, supra, 678 P.2d at 276-278; Holmgren Brothers, Inc. v. Ballard, 534 P.2d 611, 614 (Utah 1975); See also, Ryan v. Earl, 618 P.2d 54 (Utah 1980).

The very crux of this dispute focused on the ambiguity between the parties as to the terms of their agreement. The evidence at trial indicated that the parties engaged in extensive negotiations concerning the purchase of a lot, including lots other than Lot 33 of the Bridlewood Subdivision (R. 240-243). The Hatches emphasized to Embassy the fact that they could only spend $40,000.00 to purchase a lot (R. 66, 240). However, at a minimum it was quite evident

that there never existed a clear, definite and mutually understood agreement for anything other than the purchase of Lot 33 for $40,000.00.

The Utah Supreme Court established a high evidentiary standard in Van Natta v. Heywood, 195 P. 192 (Utah 1920) in the context of oral land contracts;

> This class of cases should be scrutinized with particular care; and unless under the circumstances the proof is positive, clear, and convincing, the relief sought should, and will, be denied. Id. at 574, 260 P.2d at 578.

In the case at bar, the totality of the parties agreement has been fully performed. The Hatches agreed to pay $40,000.00 for Lot 33, $20,000.00 of which was paid at the time of closing, and $20,000.00 of which was paid on July 22, 1987 (R. 66, 228). There is no other agreement, either oral or written, particularly which evidences clear, definite, unequivocal and mutually understood terms which the Trial Court could enforce. In fact, Embassy merely contended at trial that the Hatches were going to pay an additional $40,000.00 "over a period of one to two years and that it would likely be paid out of the proceeds of the sale of the home Hatch was living in...." (R. 67-68; Pre-trial Order p.3; see also Deposition of Mark Wahlquist pp. 19-20). Appellants cannot even identify what they claim the terms of repayment were under this supposed agreement, what the specific time for repayment was to have been, whether or not security was required, and certainly they cannot provide any written documentation of this purported agreement. Accordingly, the Trial Court properly denied their equitable claims.

IV

THE TRIAL COURT PROPERLY REFUSED TO GRANT RESTITUTION ON EMBASSY'S CLAIM FOR UNJUST ENRICHMENT

The Appellants recognize that any recovery under *quantum meruit* presupposes that no enforceable written or oral contract exists. (Appellant's Brief at 16-17); Davies v. Olson, 746 P.2d 264, 268 (Utah App. 1987). It is well settled law that *quantum meruit* recovery is unavailable when the subject matter for which it is sought is covered by an express contract. 42 C.J.S. Implied Contracts, §35. The law will not imply a promise to pay the value of services rendered and accepted if there is a special agreement to pay a particular amount or in a particular manner for the services [subject matter] involved. Id.

In the 1978 Utah Supreme Court case of Mann v. American Western Life Ins. Co., 586 P.2d 461 (Utah 1978), the Court held that a claim for restitution under *quasi contract* will be denied when there is an express contract covering the subject matter of the litigation. Id. 586 P.2d at 465.

Generally, a court sitting in equity may, however, reform instruments to correct errors through a mistake of the parties when an instrument does not conform to the parties intent. Reformation, however, is the remedy by which a court of equity rectifies a written instrument to express the real intent of the parties when the instrument as actually written failed to do so through mistake, fraud, or a combination of the two. 66 Am.Jur. 2d, Reformation of Instruments, Section 1. Further, a void instrument cannot be reformed. 66 Am.Jur. 2d, Reformation of Instruments, Section 7. There must have been an antecedent agreement which

the written instrument evidences, and the mistake must have been in the drafting of the instrument, not in the making of the contract [Emphasis added]. 66 Am.Jur. 2d, Reformation of Instruments Section 13, 36.

A party is not entitled to equitable relief when the evidence shows that he was negligent, aware, or should have been aware of the true facts. 27 Am.Jur. 2d, Equity, Section 34; 54 Am.Jur. 2d, Mistake, Accident or Surprise, Section 16. Appellants would like to have the court accept that the parties agreed to enter into some kind of conspiracy to deceive the lender into believing that the lot was being purchased for $40,000.00 rather than $80,000.00. The Trial Court acknowledged that were it to accept that argument, Embassy would in essence be coming to a court of equity with "unclean hands" seeking the court's blessing on their scheme to defraud the lender.

The language of a written instrument, such as a deed, is presumed to correctly show the intent of the parties or, in the case of a voluntary deed, of the grantor. The burden of proving a mistake falls on the one asserting it, accordingly, a grantor seeking reformation of a deed has the burden of proving that it is incorrect. Durham v. Creech, 231 SE2d 163 (N.C.App. 1977); 66 Am.Jur. 2d, Reformation of Instruments, Section 117. Embassy simply did not meet that burden.

Because Appellants failed to overcome the strong presumption that the written documents involved correctly evidenced the intent of the parties by "clear and convincing evidence", their claim for an additional $40,000.00 under a theory of unjust enrichment was properly denied by the trial court.

CONCLUSION

Based on the trial court's findings and judgment, the overwhelming weight of evidence in the record and legal precedent which supports the finding and judgment, coupled with the foregoing arguments, the Appellees T. Daryl and Maureen Hatch respectfully submit that the decision of the trial court must be affirmed.

Respectfully submitted this 16 day of November, 1992.

CHRISTIANSEN & SONNTAG

Kent L. Christiansen
Attorney for Defendants/Appellees

CERTIFICATE OF SERVICE

I hereby certify that I delivered a true and correct copy of the foregoing Brief of Appellees by depositing a copy thereof in the U.S. Mails, postage prepaid, this 16 day of November, 1992, and properly addressed as follows:

Heinz J. Mahler
KIPP AND CHRISTIAN, P.C.
Attorney for Plaintiff
175 East 400 South
Salt Lake City, Utah 84111-2314

TRUST DEED NOTE

DO NOT DESTROY THIS NOTE When paid, this note, with Trust Deed securing same, must be surrendered to Trustee for cancellation, before reconveyance will be made.

$ 20,000.00

Bountiful, Utah

November 25 , 19 86

FOR VALUE RECEIVED, the undersigned, jointly and severally, promise to pay to the order of SHIM INVESTMENTS

Twenty Thousand and No/100 ---------- DOLLARS ($ 20,000.00), together with interest from date at the rate of N/A per cent (N/A%) per annum on the unpaid principal, said principal and interest payable as follows

The total sum of $20,000.00, shall be due in full upon receiving long term financing or November 25, 1987, which ever occurs first.

Each payment shall be applied first to accrued interest and the balance to the reduction of principal Any such installment not paid when due shall bear interest thereafter at the rate of N/A per cent (N/A%) per annum until paid.

If default occurs in the payment of said installments of principal and interest or any part thereof, or in the performance of any agreement contained in the Trust Deed securing this note, the holder hereof, at its option and without notice or demand, may declare the entire principal balance and accrued interest due and payable.

If this note is collected by an attorney after default in the payment of principal or interest, either with or without suit, the undersigned, jointly and severally, agree to pay all costs and expenses of collection including a reasonable attorney's fee

The makers, sureties, guarantors and endorsers hereof severally waive presentment for payment, demand and notice of dishonor and nonpayment of this note, and consent to any and all extensions of time, renewals, waivers or modifications that may be granted by the holder hereof with respect to the payment or other provisions of this note, and to the release of any security, or any part thereof, with or without substitution

This note is secured by a Trust Deed of even date herewith

T. Daryl Hatch

Maureen E. Hatch

ACCEPTANCE OF TERMS BYNOTE HOLDER:

SHIM INVESTMENTS

BY

EXHIBIT "A"

ATC 110

PLAINTIFF'S EXHIBIT
EXHIBIT NO. 9
CASE NO. 48277
DATE REC'D IN EVIDENCE 12-12-91
CLERK KD

DATE REC'D IN EVIDENCE 12/2/87
CLERK KP

BOOK [illegible]
0782117
PAGE 1115
ENT 1 PT AB

ASSOCIATED TITLE CO
[illegible]6 MAIN CO
DATE [illegible]
DEPT 10 FEE 7.00

WHEN RECORDED MAIL TO

Name Mark Walquist
Street Address 200 North Main
City & State Salt Lake City, Utah 84103

ATC-D-86-12308-dh

SPACE ABOVE THIS LINE FOR RECORDER'S USE

DEED OF TRUST
WITH ASSIGNMENT OF RENTS

This Deed of Trust, made this 25th day of November, 19 86, between T. DARYL HATCH and MAUREEN E. HATCH, whose address is 7556 Stone Road (Street and number) Salt Lake City (City) UT 84121 (State), as TRUSTOR, ASSOCIATED TITLE COMPANY, a Utah corporation, as TRUSTEE, and SHIM INVESTMENTS, as BENEFICIARY,

Witnesses: That Trustor CONVEYS AND WARRANTS TO TRUSTEE IN TRUST, WITH POWER OF SALE, the following described property, situated in Davis County, State of Utah:

All of Lot 33, Bridlewood Subdivision Phase 2, according to the official plat thereof, on file and of record in the Davis County Recorder's Office.

01-153-0033

[illegible]

Together with all buildings, fixtures and improvements thereon, and all water rights, rights of way, easements, rents, issues, profits, income, tenements, hereditaments, privileges and appurtenances thereunto belonging, now or hereafter used or enjoyed with said property, or any part thereof SUBJECT, HOWEVER to the right, power and authority hereinafter given to and conferred upon Beneficiary to collect and apply such rents, issues, and profits

For the Purpose of Securing:

(1) payment of the indebtedness evidenced by a promissory note of even date hereof in the principal sum of $ 20,000.00, made by Trustor, payable to the order of Beneficiary at the times, in the manner and with interest as therein set forth, and any extensions and/or renewals or modifications thereof, (2) the performance of each agreement of Trustor herein contained, (3) the payment of such additional loans or ad-

[illegible]

15 The failure on the part of Beneficiary to promptly enforce any right hereunder shall not operate as a waiver of such right and the waiver by Beneficiary of any default shall not constitute a wa ver of any other or subsequent default

16 Time is of the essence hereof Upon default by Trustor in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder all sums secured hereby shall immediately become due and payable at the option of Beneficiary In the event of such default Beneficiary may execute or cause Trustee to execute a written notice of default and of election to cause said property to be sold to satisfy the obligations hereof and Trustee shall file such notice for record in each county wherein said property or some part or parcel thereof is situated Beneficiary also shall deposit with Trustee the note and all documents evidencing expenditures secured hereby

17 After the lapse of such time as may then be required by law following the recordation of said notice of default and notice of default and notice of sale having been given as then required by law Trustee without demand on Trustor shall sell said property on the date and at the time and place designated in said notice of sale either as a whole or in separate parcels and in such order as it may determine (but subject to any statutory right of Trustor to direct the order in which such property if consisting of several known lots or parcels shall be sold) at public auction to the highest bidder the purchase price payable in lawful money of the United States at the time of sale The person conducting the sale may for any cause he deems expedient postpone the sale from time to time until it shall be completed and in every su h case notice of postponement shall be given by public declaration thereof by such person at the time and place last appointed for the sale provided if the sale is postponed for longer than one day beyond the day designated in the notice of sale notice thereof shall be given in the same manner as the original notice of sale Trustee shall execute and deliver to the purchaser its Deed conveying said property so sold but without any covenant of warranty express or implied The recitals in the Deed of any matters or facts shall be conclusive proof of the truthfulness thereof Any person including Beneficiary may bid at the sale Trustee shall apply the proceeds of the sale to payment of (1) the costs and expenses of exercising the power of sale and of the sale including the payment of the Trustee s and attorney s fees (2) cost of any evidence of title procured in connection with such sale and revenue stamps on Trustee s Deed (3) all sums expended under the terms hereof not then repaid with accrued interest at 18 per annum from date of expenditure (4) all other sums then secured hereby and (5) the remainder if any to the person or persons legally entitled thereto or the Trustee in its discretion may deposit the balance of such proceeds with the County Clerk of the county in which the sale took place

18 Trustor agrees to surrender possession of the hereinabove described Trust property to the Purchaser at the aforesaid sale immediately after such sale in the event such possession has not previously been surrendered by Trustor

19 Upon the occurence of any default hereunder Beneficiary shall have the option to declare all sums secured hereby immediately due and payable and foreclose this Deed of Trust in the manner provided by law for the foreclosure of mortgages on real property and Beneficiary shall be entitled to recover in such proceedings all costs and expenses incident thereto including a reasonable attorney s fee in such amount as shall be fixed by the court

20 Beneficiary may appoint a su cessor trustee at any time by filing for record in the office of the County Recorder of each county in which said property or some part thereof is situated a substitution of trustee From the time the substitution is filed for record the new trustee shall succeed to all the powers duties authority and title of the trustee named herein or of any successor trustee Each such substitution shall be executed and acknowledged and notice thereof shall be given and proof thereof made in the manner provided by law

21 This Deed of Trust shall apply to inure to the benefit of and bind all parties hereto their heirs legatees devisees administrators executors successors and assigns All obligations of Trustor hereunder are joint and several The term Beneficiary shall mean the owner and holder including any pledgee of the note secured hereby In this Deed of Trust whenever the context so requires the masculine gender includes the feminine and or neuter and the singular number includes the plural

22 Trustee accepts this Trust when this Deed of Trust duly executed and acknowledged is made a public record as provided by law Trustee is not obligated to notify any party hereto of pending sale under any other Deed of Trust or of any action or proceeding in which Trustor Beneficiary or Trustee shall be a party unless brought by Trustee

23 This Deed of Trust shall be construed according to the laws of the State of Utah

24 The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at the address herein before set forth

Signature of Trustor

T. Daryl Hatch

Maureen E. Hatch

STATE OF UTAH)
County of Davis) ss

On the 25th day of November AD 19 86 personally appeared before me
T. Daryl Hatch and Maureen E. Hatch
the signer s of the within instrument who duly acknowledged to me that they executed the same

My Commission expires 10-23-88

NOTARY PUBLIC DAWN HILL STATE OF UTAH

Notary Public, Residing at
Salt Lake City, Utah

STATE OF UTAH)
County of) ss

On the AD 19 personally appeared before me
and who being by me duly sworn did say each for himself that he the said
is the President and he the said is the Secretary
of and that the within and foregoing instrument was signed in behalf of said corporation by
authority of a resolution of its Board of Directors and said and
each duly acknowledged to me that said corporation executed the same and that the seal affixed is the seal of said corporation

My Commission expires

Notary Public, Residing at

ASSOCIATED TITLE COMPANY

298 2400 SELLER'S STATEMENT PAGE 1
Associated Title Company

DATE: 11/25/86 GF NO: D12308

SALE FROM: SHIM INVESTMENTS
TO: T. DARYL HATCH and MAUREEN E. HATCH

PROPERTY: 3933 SOUTH BRIDLEWOOD DRIVE
BOUNTIFUL, UTAH 84010

SALES PRICE		$ 40,000.00
REIMBURSEMENTS / CREDITS:		
NO REIMBURSEMENTS / CREDITS		
GROSS AMOUNT DUE TO SELLER		$ 40,000.00
LESS: CHARGES AND DEDUCTIONS:		
Down Payment or Earnest Money.....	$ 100.00	
Title Policy Charges:		
Title insurance to Associated Title Company	$ 117.00	
Escrow to Associated Title Company	$ 75.00	
Total Title Policy Charges	$ 192.00	
NOTE FOR SELLERS EQUITY	$ 20,000.00	
TOTAL CHARGES AND DEDUCTIONS		$ 20,292.00
NET AMOUNT DUE TO SELLER		$ 19,708.00

Seller understands the Closing or Escrow Agent has assembled this information representing the transaction from the best information available from other sources and cannot guarantee the accuracy thereof. Any real estate agent or lender involved may be furnished a copy of this Statement.

Seller understands that tax and insurance prorations and reserves were based on figures for the preceding year or supplied by others, or estimates for current year, and in the event of any change for current year, all necessary adjustments must be made between Purchaser and Seller direct.

The undersigned hereby authorizes the Closing or Escrow Agent to make expenditures and disbursements as shown above and approves same for payment. The undersigned also acknowledges receipt of Loan Funds, if applicable, in the amount shown above and receipt of a copy of this Statement.

EXHIBIT "C"

PLAINTIFF'S EXHIBIT
EXHIBIT NO. 7
CASE NO. 48277
DATE REC'D 12-12-91

SHIM INVESTMENTS

* Note: Interest of existing liens is figured to the date indicated. If not paid by then, additional interest will have to be collected and your statement will be adjusted to have sufficient funds to secure release from the lienholder.

ASSOCIATED TITLE COMPANY

298-2400 PURCHASER'S STATEMENT PAGE 1
Associated Title Company

ATE: 11/25/86 GF NO: D12308

ALE FROM: SHIM INVESTMENTS
TO: T. DARYL HATCH and MAUREEN E. HATCH

ROPERTY: 3933 SOUTH BRIDLEWOOD DRIVE
BOUNTIFUL, UTAH 84010

JRCHASE PRICE			$ 40,000.00
JUS: CHARGES / DISBURSEMENTS:			
Recording and Transfer Charges:			
Recording fee: Deed	$ 6.00		
Recording fee: Mortgage	$ 20.00		
Total Recording and Transfer Charges		$ 26.00	
Title Policy Charges:			
Escrow to Associated Title Company	$ 75.00		
Total Title Policy Charges		$ 75.00	
TOTAL CHARGES / DISBURSEMENTS			$ 101.00
GROSS AMOUNT DUE BY PURCHASER			$ 40,101.00
SS: CREDITS / FUNDS RECEIVED:			
Down Payment or Earnest Money		$ 100.00	
NOTE FOR SELLERS EQUITY		$ 20,000.00	
TOTAL CREDITS / FUNDS RECEIVED			$ 20,100.00
NET AMOUNT DUE BY PURCHASER			$ 20,001.00

rchaser understands the Closing or Escrow Agent has assembled this information presenting the transaction from the best information available from other urces and cannot guarantee the accuracy thereof. Any real estate agent or nder involved may be furnished a copy of this Statement.

rchaser understands that tax and insurance prorations and reserves were sed on figures for the preceding year or supplied by others, or estimates r current year, and in the event of any change for current year, all cessary adjustments must be made between Purchaser and Seller direct.

e undersigned hereby authorizes the Closing or Escrow Agent to make penditures and disbursements as shown above and approves same for payment. e undersigned also acknowledges receipt of Loan Funds, if applicable, in e amount shown above and receipt of a copy of this Statement.

EXHIBIT "D"

T. DARYL HATCH

MAUREEN E. HATCH

Note: Interest of existing liens is figured to the date indicated. If not paid by then, additional interest will have to be collected and your statement will be adjusted to have sufficient funds to secure release from the lienholder.

IN EVIDENCE 4-13-11
CLERK KD

WHEN RECORDED, MAIL TO: 0762113 1110

1986 NOV 26 AM 11:03

DAVIS COUNTY RECORDER

Granada, Inc.

PAGE ___ EN 2 PT ___ AB ___

DEPUT GD FEE 5.00

200 North Main

Salt Lake City, UT 84103

Space Above for Recorder's Use

070 D&6 1028 11

SPECIAL WARRANTY DEED

[CORPORATE FORM]

SHIM INVESTMENTS, a Utah Limited Partnership, by its General Partner, GRANADA, INC., a corporation organized and existing under the laws of the State of Utah, with its principal office at Salt Lake City, of County of Salt Lake, State of Utah grantor, hereby CONVEYS AND WARRANTS against the Acts of the Grantor only to

T. DARYL HATCH and MAUREEN E. HATCH, husband and wife, as joint tenants

grantee of Salt Lake City, County of Davis for the sum of TEN AND NO/100---------- DOLLARS the following described tract of land in Davis County, State of Utah:

All of Lot 33, BRIDLEWOOD SUBDIVISION PHASE 2, according to the official plat thereof, on file and of record in the Davis County Recorder's Office.

~~01-153-0033~~

01-153-0033

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the grantor at a lawful meeting duly held and attended by a quorum.

In witness whereof, the grantor has caused its corporate name and seal to be hereunto affixed by its duly authorized officers this 25th day of November, A. D. 1986

Attest:

Assistant Secretary.

GRANADA, INC.

By

Vice- President.

[CORPORATE SEAL]

STATE OF UTAH,

County of Salt Lake } ss.

On the 25th day of November, A. D. 1986 personally appeared before me Keith B. Sorensen and LaMar C. Hatch who being by me duly sworn did say, each for himself, that he, the said Keith B. Sorensen is the Vice- president, and he, the said LaMar C. Hatch is the secretary of Granada, Inc., and that the within and foregoing instrument was signed in behalf of said corporation by authority of a resolution of its board of directors and said Keith B. Sorensen and LaMar C. Hatch each duly acknowledged to me that said corporation executed the same and that the seal affixed is the seal of said corporation.

Notary Public.

My commission expires 5/25/88 My residence is Murray, Utah

FORM 104C—WARRANTY DEED, SPECIAL, CORP. FORM— © GEM PTG CO. — 3215 SO 2600 EAST — SALT LAKE CITY

EXHIBIT "F"